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# WTO Dispute Settlement System: Latin American countries behavior in the period 1995-2017

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## ABSTRACT

The purpose of this document is to provide a general overview of the participation of Latin American and Caribbean countries in the World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM) during the period from 1995-2017. The region as a whole has been an active user of this mechanism, and some Latin American countries are even among the main users at the global level. In fact, the region's countries frequently prefer the DSM over other alternative forums available when settling commercial disputes.

This article is divided into two sections, the first of which analyzes Latin American and Caribbean behavior in terms of the WTO's DSM, with special emphasis on their participation as complainant, respondent and third parties. The second section is aimed at generating a hypothesis regarding the preference for the WTO's DSM in comparison to other commercial dispute settlement mechanisms.

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## What is the DSM?

Within the framework of the WTO, dispute settlement responds to the rules and procedures governing the Dispute Settlement Understanding (DSU), which came about as a result of the Uruguay Round. This instrument is grounded upon over forty years of experience of commercial dispute settlement under articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT).

However, on January 1, 1995, with the formal creation of the World Trade Organization (WTO) resulting from the Uruguay Round negotiations, the commercial dispute settlement mechanism was condensed within the Dispute Settlement Understanding (DSU), incorporating a series of significant innovations regarding the present provisions of the GATT 1947. These provisions seek to resolve the main complexities and facilitate the processes involved<sup>1</sup> (Jackson, Davey y Sykes 2002, 214-254).

In essence, "the GATT Contracting Parties transformed, in a highly pragmatic manner over a period of five decades, what was initially a rudimentary, power-based system for settling disputes through diplomatic negotiations into a fairly elaborate, rules-based system for settling disputes through adjudication" (Kaiser 2006). The WTO's dispute settlement system then became a key element to support the security and predictability of the multilateral trade system.

In this sense, its objective responds to a need for positive commercial dispute settlement while eliminating measures that are incompatible with the rules of any WTO agreement. To this effect, a mechanism has been established which is the only one of its kind and in the field of international law, due to its emphasis on legality as a means for dispute settlement (Jackson, The Role and Effectiveness of the WTO Dispute Settlement Mechanism. 2000), but without leaving aside the political elements that favor and facilitate the processes such as, for example, the Consultation phase, which will be developed in greater depth in the following section.

At the same time, this is a quasi-automatic mechanism, as it operates according to negative consensus or reverse consensus, in that the system works automatically unless there is a consensus to stop it (Marceau 2005). This mechanism considers the State as the subject of legislation and is activated at the request of any Member of the WTO<sup>2</sup> to claim another Member's failure to comply with the obligations of agreements entered, which applies a measure, contrary or not to the provisions of one or more agreements framed within the institution.

## How it Works?

The following entities are responsible for the function and operation of the DSU: The Dispute Settlement Body (DSB), Panels and the Appellate Body (AB). The DSB is the body with the greatest "political weight" in the system, as it is made up of all WTO Member countries (Wilson 2005). It is in charge of managing the rules and procedures of the DSU. Consequently, it has the power to establish Panels, adopt the reports issued by the Panels and the AB, control the application of resolutions and recommendations and suspend concessions and other obligations.

The Panels are ad hoc bodies established for each particular dispute at the request of the parties involved. The WTO Secretariat is responsible for providing legal and procedural assistance to the Panels, as well as technical and administrative support (Delpiano Lira 2011).

On the other hand, the AB is a permanent institution made up of seven people nominated by the DSB for fixed four-year terms, renewable one time only. In each dispute, three of the members shall be responsible for hearing the appeal presented against the Panel's decision. Given AB's importance, it is often referred to as the "World Trade Court" (Van den Bossche 2005). The AB has its own administrative and legal support, provided by the Appellate Body Secretariat (Trachtman 2005).

These institutions are responsible for settling commercial disputes that may arise within the framework of WTO agreements between two or more parties. The system's success responds, in large part, to the structure and procedures established by the DSU. This process follows the stages described below:

- Consultations:

Consultations between Members constitute the first phase of the WTO dispute settlement procedure. This part of the process is, in essence, political-diplomatic by nature and is performed notwithstanding the rights of any Member

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<sup>1</sup>Three of the most important innovations of the DSU are the quasi-automatic adoption of requests for Special Group establishment, of the reports and of the requests for authorization to suspend concessions; the strict timeframes for the different stages of the dispute settlement process; and, the possibility of panel reports being examined by the Appellate Body (Bhagwati 2000, Jackson 2000).

<sup>2</sup>The participation of people or NGOs in the procedure, through the *amicus curiae* figure, has been a controversial topic, such that the government is responsible for carrying out the activities within the framework of a dispute.

in other possible diligences. A third Member with substantial commercial interest may express its interest in participating in the consultations, if these have been requested in accordance with Article XXII of the GATT of 1994. To this effect, any Member may request consultations with another with respect to the measures adopted in its territory and which affect the operation of an agreement entered. During these consultations, the Members must try to reach a satisfactory solution to the matter. These may go on for a total of up to 60 days (Jackson, Davey y Sykes 2002, 269).

- The Panel:

If the consultations do not lead to a satisfactory agreement between the parties, as mentioned above, a Panel is established by the DSB. To facilitate its selection, the WTO Secretariat keeps a list of individuals. The panels are made up of three members, as a general rule, unless the parties involved in the dispute agree to a five-member panel. The selection process begins with the proposal of candidates by the Secretariat, to which the parties shall agree. If no agreement is reached, the Director General of the WTO, at the request of either of the parties, shall designate the panel members (Hughes 2004). The process to establish the Panel may not exceed 45 days (Jackson, Davey y Sykes 2002, 269-274).

The Panel's job is to examine the matter, in light of the pertinent provisions of the agreements cited, and formulate conclusions that will help the DSB make recommendations or resolutions. Any Member that has a substantial interest in a matter presented to a Panel, and this has been notified to the DSB, may participate as a third party in the procedure. The basic objective of this is so that the Members can protect their own systemic interests. The DSU gives third parties the right to be heard before the Panel and to present written communications. These rights, which are relatively limited, have been broadened by the Panels in special cases where considered relevant<sup>3</sup> (Marceau 2005).

The Panel must issue a preliminary report to the parties to which the latter must submit observations within a given timeframe. At the end of said timeframe, the Panel shall submit a complete provisional report to the parties, including its support and conclusions. The parties may ask it to reexamine any concrete aspect before distributing it as a final report to the other Members. If no observations are received, the provisional report shall be considered final and will be distributed to the other Members. The Panel's report shall be examined by the DSB, which shall then adopt it, unless one of the parties in the dispute notifies its decision to appeal or if the DSB decides by consensus not to adopt the report. The period between the moment the Panel is established, and the completion of its tasks shall not exceed 6 months.

- Appeals:

The parties in the dispute may present an appeal against the Panel's report to the AB. Third parties with substantial interest may present communications before the AB, and shall be given the opportunity to be heard. The subject of the appeal shall only be matters of law covered in the Panel's report and the legal interpretations made by the Panel. The two fundamental features of the AB's work procedures are its legal nature and an emphasis on joint discussion among the participants (Van den Bossche 2005).

The appeal may lead to the confirmation, modification or repeal of the Panel's legal support and conclusions. Normally, the duration of the appeals procedure shall not exceed 60 days, and under no circumstances shall it go beyond 90 days. The DSB has to accept or reject the appeals examination report within a period of 30 days, and may only reject it by consensus.

- Compliance:

The DSU favors placing the measure of compliance with agreements entered as it is the best way to rebalance the original concessions negotiated among Members (McGivern 2005). In order to obtain said compliance, the DSU establishes that the affected Member must inform the DSB of its purpose regarding the application of said recommendations. In cases where immediate compliance is not feasible, the affected Member shall be given a reasonable timeframe to do so. This timeframe shall be that proposed by the Member itself if approved by the DSB, that established upon mutual agreement of the parties in the dispute or, if no such agreement is reached, that defined in a binding arbitration. To guide the arbitration, the DSU states that the reasonable timeframe shall normally not exceed 15 months from the date of adoption of the Panel's or AB's report, although this may be longer or shorter, given the circumstances.

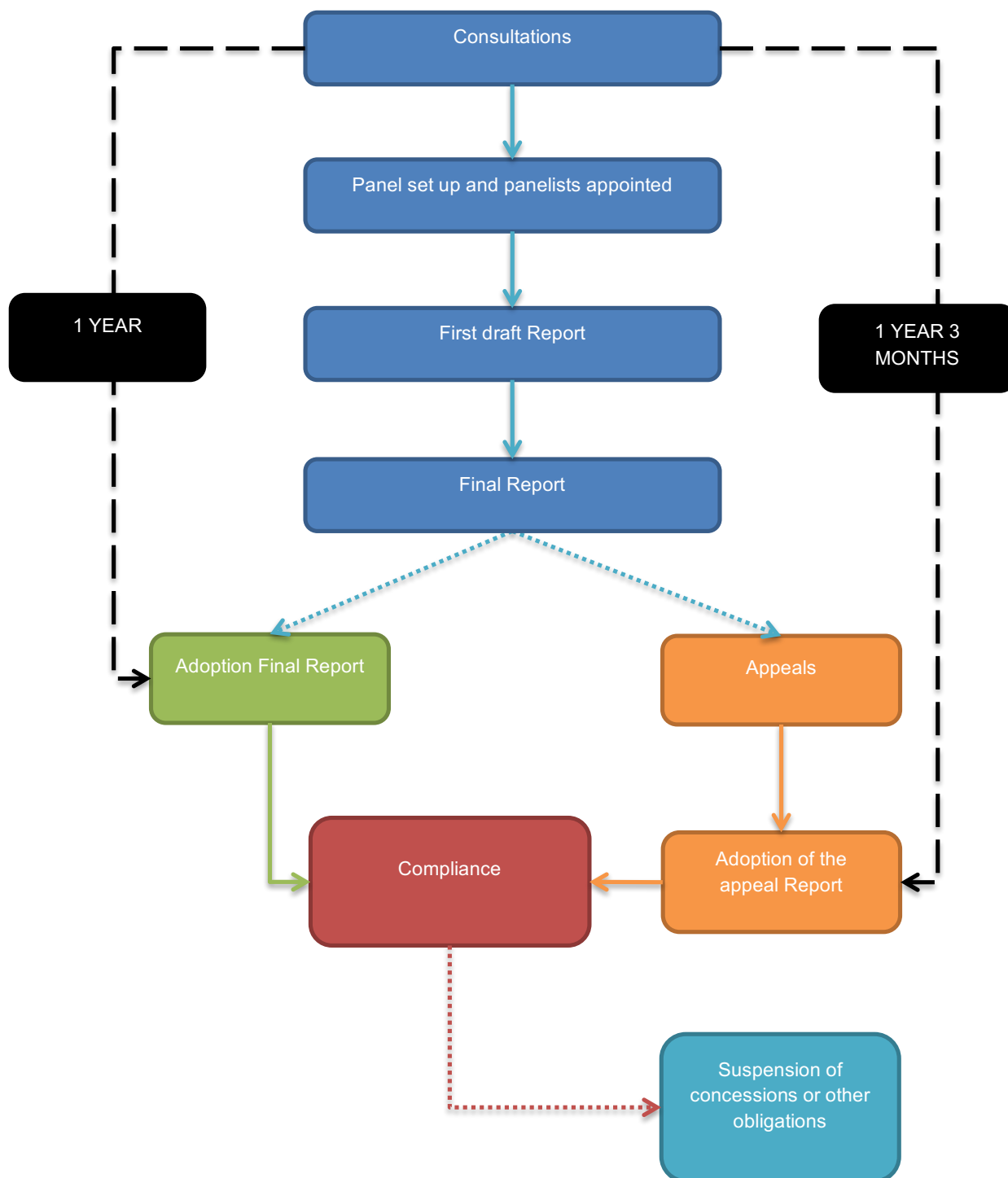
If the affected Member does not comply within the reasonably determined timeframe, negotiations shall begin, if so requested, with any of the parties in the dispute in the pursuit of mutually acceptable compensation. Once the abovementioned reasonable timeframe has ended, and no such compensation has been agreed upon, either of the parties in the dispute may request authorization of the DSB to suspend the application of concessions or other obligations resulting from the agreements entered to the affected Member, equivalent to the level of nullification or impairment, according to the procedures and principles established by the DSU itself. The DSB must grant authorization to suspend concessions or obligations unless it decided by consensus to reject the request. The

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<sup>3</sup>In this sense, please review the case DS27- Bananas III.

suspension of concessions or shall be temporary and shall only apply up until the measure has been declared incompatible, until the Member offers a solution to the nullification or impairment of benefits, or until a mutually satisfactory settlement has been reached. In any case, the matter shall remain within the oversight of the DSB until compliance is met, which in practice, however, has had a limited impact (McGivern 2005).

**DIAGRAM 1: FLOW CHART OF THE WTO'S DSM**



Source: Compiled by author based on the DSU Rules and Procedures [online]  
[https://www.wto.org/spanish/thewto\\_s/whatis\\_s/tif\\_s/agrm1\\_s.htm](https://www.wto.org/spanish/thewto_s/whatis_s/tif_s/agrm1_s.htm)

## Participations

The WTO's DSM is the cornerstone for the governability of the multilateral trade system. Since its creation in January of 1995, the World Trade Organization has carried out more than 500 disputes covering a wide range of economic activities. In these 531 cases, there have been 3551 participations by the WTO member economies.

Sixteen percent (16% or 558) of these participations were as complainant, 15% (543) as respondent and the remaining 69% (2450) as third parties. The substantial number of participations as third parties shows the success of this organization in transforming commercial disputes into systemic phenomena which are of global interest.

As such, it is worth asking about the place held by Latin America and the Caribbean in this system. In this sense, it is important to mention that of the 531 cases filed, 134 include the participation of a Latin American country as complainant or respondent (25% of all cases) and nearly 5% of the total cases filed in the DSM are between two or more Latin American countries.

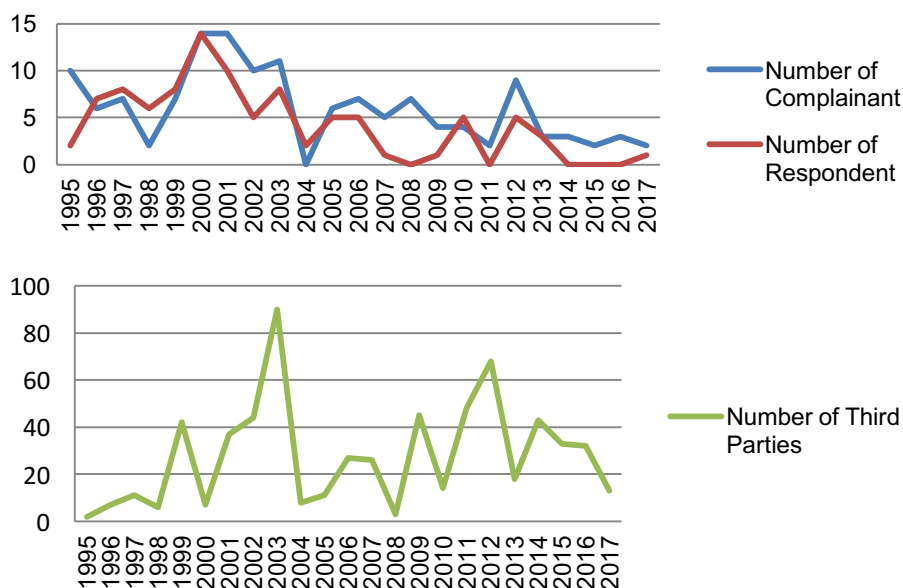
### What about LAC countries?

LAC countries have 865 total participations, representing 20% of all participations. Of these 865, the Latin American and Caribbean countries have participated 131 times as complainant, 95 times as respondent and 639 times as third parties; representing 15%, 11% and 74% of its participations in the DSM, respectively.

The Latin American and Caribbean participation in the WTO's DSM shows no historical trend in particular, except for the fact that the peak participation occurred between the years 2000 and 2003, as both respondent and complainant. Additionally, it is important to mention that in 2004 no Latin American country filed cases before the DSB. Under the same logic, in 2008 and 2011 and from 2014 to 2016, no LAC country has participated as a respondent (See Chart 2).

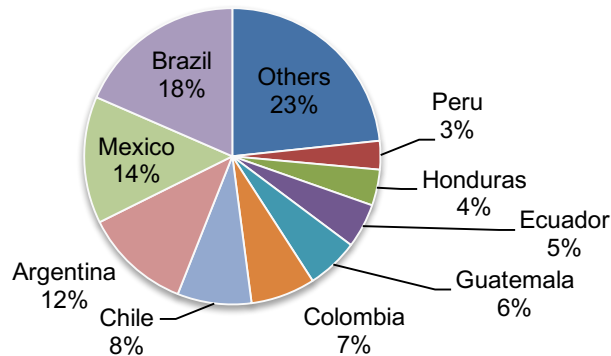
Regarding their participation as third parties, this has also followed no defined pattern. The first peak occurs in 2000, with a total of 90 participations as third parties, while the second peak was in 2012 with 68 participations as such. Likewise, it is important to mention that, since the creation of the DSU, there have been no years in which a Latin American country has not participated as a third party (See Chart 2).

**Chart 2: Participation as Complainant, Respondent and Third Party**



From 1995 to now, no two Latin American countries have presented the same participation trends. Brazil leads the region in participations with a total of 160, followed by Mexico with 120 and then Argentina with 101. These three countries are followed by Chile, Colombia, Guatemala, Ecuador and Honduras with 70, 61, 49, 42, 34 and 27 participations respectively (See Chart 3).

**Chart 3: Total participations by country**

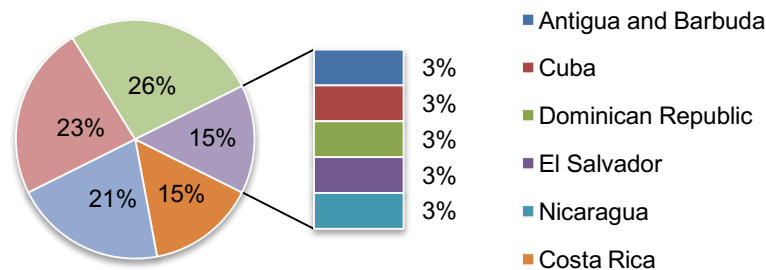


### LAC as Complainant

As mentioned in the previous section, Brazil, Mexico and Argentina are the members with the highest number of participations in the DSM, but they are also the countries that are the most complainant, with nearly 57% of the cases filed by the countries in the region. When including Chile, this percentage increases to 64%.

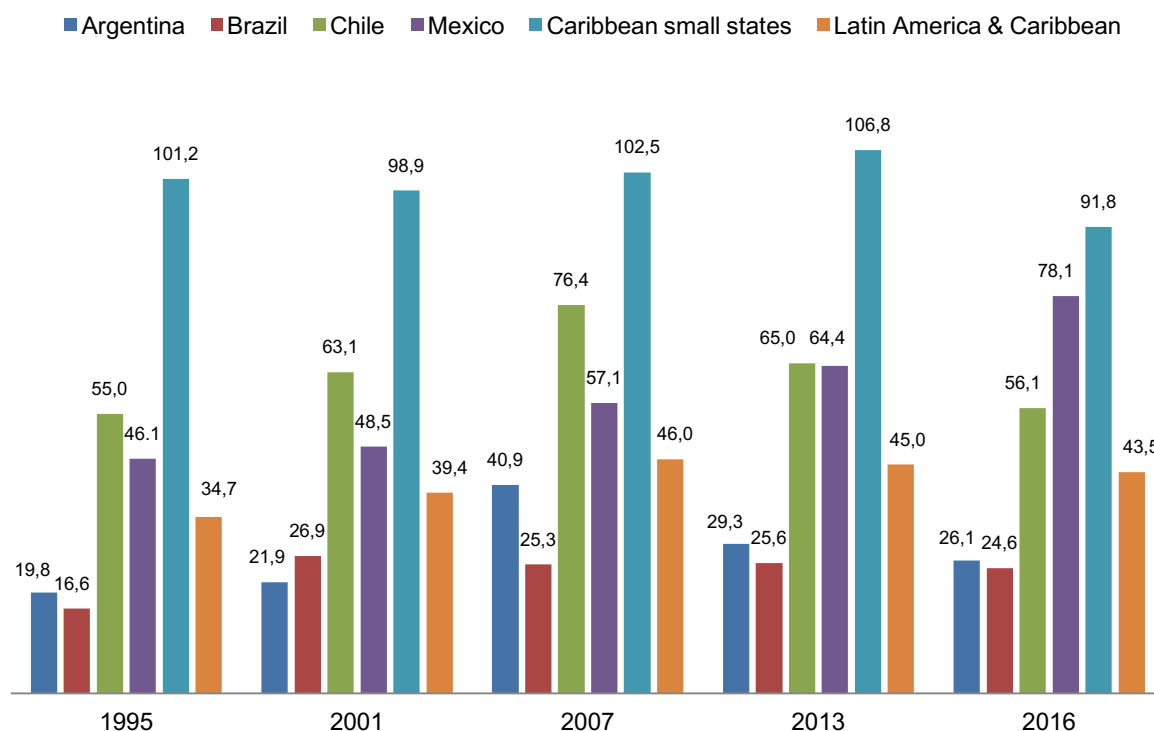
On the other hand, the Central American and Caribbean countries have also participated actively in the DSM, although this participation increased due to the Bananas III (DS27) case, which shall be discussed in further detail below. Guatemala leads this group with 9 participations, followed by Honduras, Panama and Costa Rica with 8, 7 and 5 participations, respectively. Antigua and Barbuda, Cuba, El Salvador, Nicaragua and the Dominican Republic have been complainant only once (See Chart 4).

**Chart 4: Number of participations**



It might be thought that the participation of LAC is due to its trading volume, although this hypothesis is not necessary true. As can be seen in Chart 5 (See Chart 5), the Caribbean countries have a greater dependence on trade and, despite this, their participation is not the most significant in the region. Likewise, Brazil and Argentina are the countries that are most active as complainants, although trade represents a small portion of their GDP (See Appendix 1).

### Chart 5: Trade (% GDP)



With regards to the Latin American country counterparts in commercial disputes within the framework of the DSM, two dynamics can be considered: extra-regional and intraregional.

Intraregional cases represent 31% of the total cases filed by Latin American and Caribbean countries and 4.9% of the total cases filed within the framework of the WTO's DSM. The country that has been the complainant most times in cases with its Latin American trade partners is Argentina, with 8 complaints filed, followed by the Dominican Republic with 7, Chile with 6, and Mexico and Peru with 5 each. Then, Colombia and Ecuador have filed complaints against other countries of the region 3 times each, Trinidad and Tobago, Guatemala and Nicaragua 2 times and the others (Brazil, Costa Rica, Panama and Uruguay) only once. (See Chart 8).

Based on these figures, it is interesting to note the case of Brazil given its high volume of intraregional trade. In 2015, it was ranked the third country with the most exports to Latin America and fourth in terms of imports<sup>4</sup>, so a greater number of commercial disputes would be expected.

With respect to Argentina and Brazil, it is important to note the level of trade between the two. In 2015, Brazil was Argentina's top import and export partner, and Argentina was Brazil's third and fourth commercial partner, respectively, representing the strongest bilateral commercial relations in the region. Even still, only 3 cases were presented before the DSM<sup>5</sup>. In practice, both countries have preferred to pursue negotiated settlements in the framework of both the MERCOSUR Dispute Settlement Mechanism, which they both belong to, and other more informal court negotiations (Herrerros y García-Millán 2015). Another relationship that sticks out is that between Mexico and Brazil, the second most important bilateral commercial relations in the region, which, although its trade volume is just as significant, Brazil has filed a complaint against Mexico only once, while Mexico has presented no complaints against Brazil.

Regarding participations as complainant in extra-regional cases, the country against which the most complaints have been filed is the United States, representing 41% of the cases filed by the LAC (33 complaints), which correlates to its trade volume with the region, accounting for 45% of LAC exports and 32% of imports in 2015. This is followed by the European Union, with 38% of the cases (31 complaints). It should be noted that China, which has a significant trade volume with Latin America and, although it entered the multilateral trade system in 2001, accounts

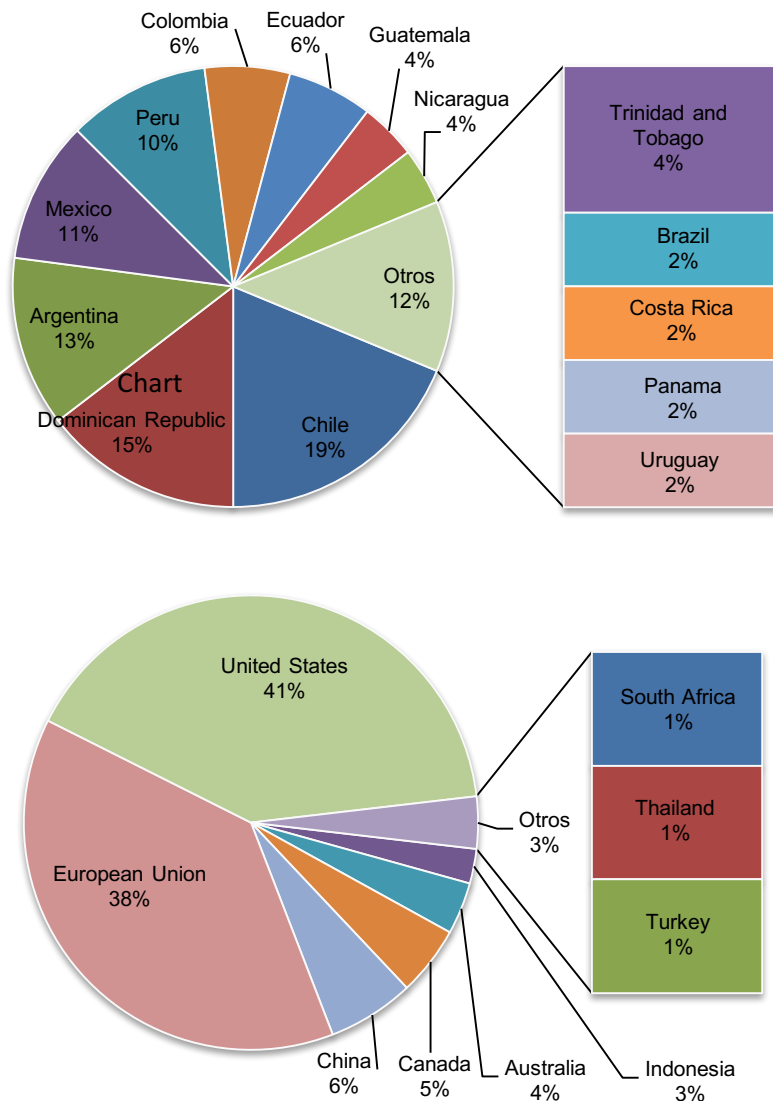
<sup>4</sup> Data obtained from <http://wits.worldbank.org> [consulted online, October 16, 2017].

<sup>5</sup> The cases between Argentina and Brazil that were resolved through the DSM are DS190 in 2000, DS241 in 2001 and DS355 in 2006.

for less than 6%<sup>6</sup> of the cases filed by the LAC countries<sup>7</sup>.

Then comes Canada, Australia and Indonesia with 4, 3 and 2 complaints, respectively and, finally, South Africa, Thailand and Turkey with one complaint each (See Chart 6).

**Chart 6: LAC as complainant**



## LAC as respondent

The previous section discusses complaints filed before the DSM by Latin American countries. This section will focus on the participation of Latin American and Caribbean countries as respondents. In this sense, the region has had 96 complaints filed against it, 46 of which have been intra-Latin American, while the remaining 47 have been extra-regional. As such, it is interesting to note the considerable number of intra-LAC complaints, representing nearly 50% of the total complaints filed against the region. At both the intraregional and extra-regional levels, it stands to ask why these disputes are not settled within the framework of the preferential trade agreements existing between the parties. This point shall be developed in further in the upcoming sections.

Among the extra-regional complaints, the European Union has filed the most complaints against the region with 21

<sup>6</sup> This 6% represents 5 cases in which 4 have been filed by Mexico and one by Guatemala.

<sup>7</sup> In 2015, 6% of Latin American goods exports went to the European Union, while 5% of its imports came from that region. In the case of goods exported to China, this represented 8% of the total, while imports from China accounted for 18%. For more information, please see <http://trade.ec.europa.eu> and <http://wits.worldbank.org>.

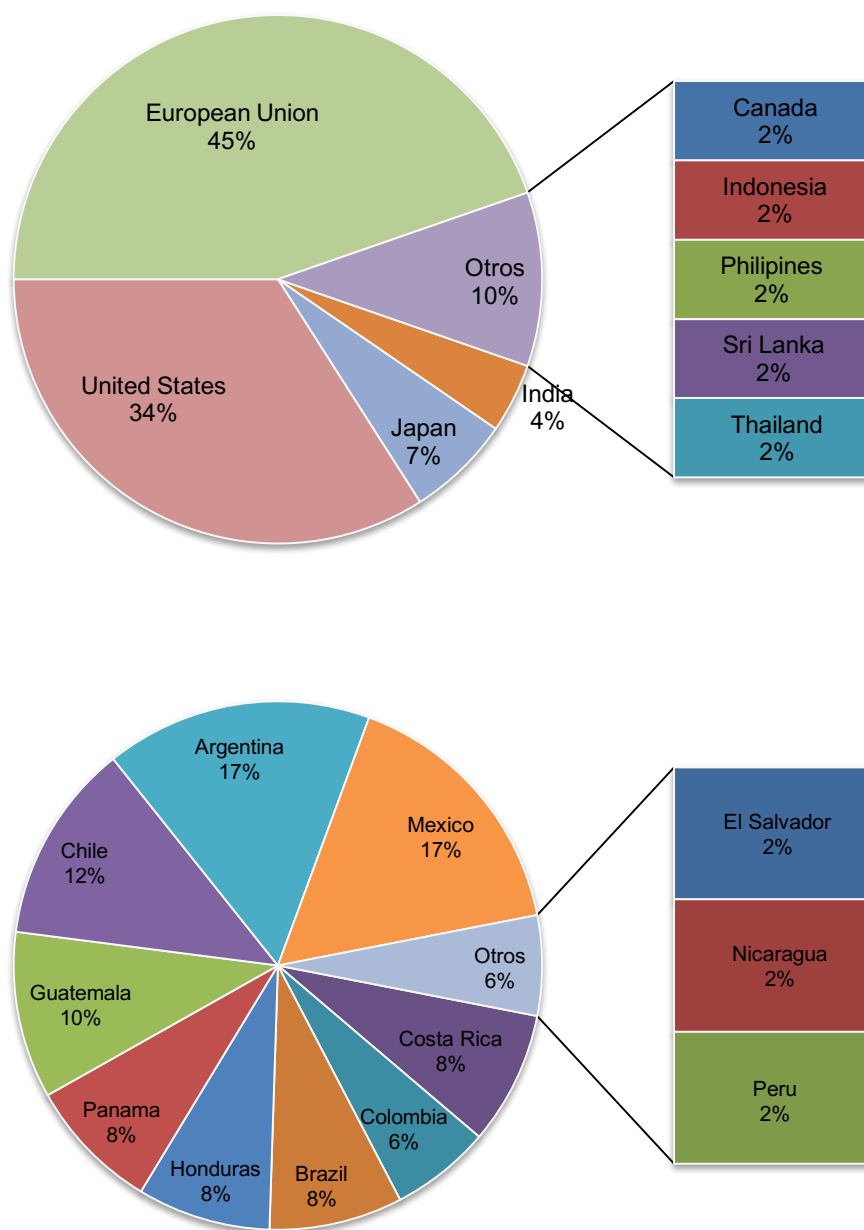


complaints (45% of extra-regional cases), followed by the United States with 16 complaints (36%). Then comes Japan and India with 3 and 2 complaints each<sup>8</sup>.

With regards to intraregional complaints, Argentina and Mexico take the lead with 17% of the complaints, equivalent to 8 cases each. In the case of Argentina, it has filed 6 complaints against Chile, one against Brazil and one against Peru. In the case of Mexico, it has filed two complaints against Ecuador and Guatemala, and one against Argentina, Costa Rica, Panama and Venezuela.

The Caribbean has not filed any complaints against other countries in the region, however, Central America has. Panama, Costa Rica, and Honduras have filed 4 intraregional complaints, while El Salvador and Nicaragua have filed complaints only once against another trade partner in the region.

**Chart 7: LAC as respondent**



<sup>8</sup> Japan presented one complaint against Argentina in 2012 (DS445) and two against Brazil in 1996 and 2015 (DS51 and DS497). On the other hand, India filed complaints against Argentina and Brazil, both cases in 2001 (DS233 and DS229).

## LAC as third parties

Third-party participation in the DSM is regulated by article 10 of the DSU and establishes that a Member with "substantial interest in a matter before a panel" qualifies as a third party in the dispute. For third-party participation in consultations, this must be approved by the respondent, according to Article 4.11 of the DSU, and potential third parties must demonstrate "substantial commercial interest".

Participation as a third party in a dispute within the framework of the DSM gives both parties the chance to present their arguments at the first dispute meeting and in writing. In this sense, there are a variety of motivations for joining as a third party. First, it is completely possible that the claim presented against a respondent is directed at a similar measure maintained by another Member. Therefore, the Member would have direct interest in the result of the procedure, especially if the measure is justified. Additionally, the Member may have a high trade volume for the product or service covered in the claim, or the measurement disputed may be something the Member also wishes to challenge but lacks the capacity to file a complaint against (Busch & Reinhardt, 2006).

Perhaps the most important thing is that, when acting as a third party, the Members have the possibility of participating in the Panel process, but may state their opinion on the disputed measure considered during the process (Busch y Reinhardt 2003). Article 10.2 of the DSU establishes that third parties "have an opportunity to be heard by the panel, and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report"<sup>9</sup>.

However, within the framework of the DSM, several observations have been made regarding the countries that are able to participate as third parties. For example, in the case EC - Bananas III (DS27)<sup>10</sup>, it was clarified that a "substantial commercial interest" does not require an explicit legal interest, but the exact meaning of substantial commercial interest remains ambiguous (Busch y Reinhardt, Three's a crowd: third parties and WTO dispute settlement 2006).

On the other hand, the AB stated in the case US-1916 act (DS162)<sup>11</sup> that "according to the DSU, as it stands, third parties only have the right to the participation rights established in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3." However, in some cases, third parties may be granted "enhanced rights" allowing them to participate above and beyond the rights described in the relevant articles and appendixes of the DSU. Enhanced third-party rights have been granted in only a handful of disputes, and on a case-by-case basis.

One example of this, once again, is the EC-Bananas III (DS27) case, where several Members filed a request for enhanced third-party rights, including participation in all procedures, as well as access to all written submissions of the parties involved in the dispute. In this sense, the Panel agreed to allow the third parties to sit in on the second substantive meeting, arguing the important economic effect of the EC banana regime. Even still, the granting of enhanced third-party rights is done on a case-by-case basis, and is determined at the Panel's discretion according to the general criteria described above.

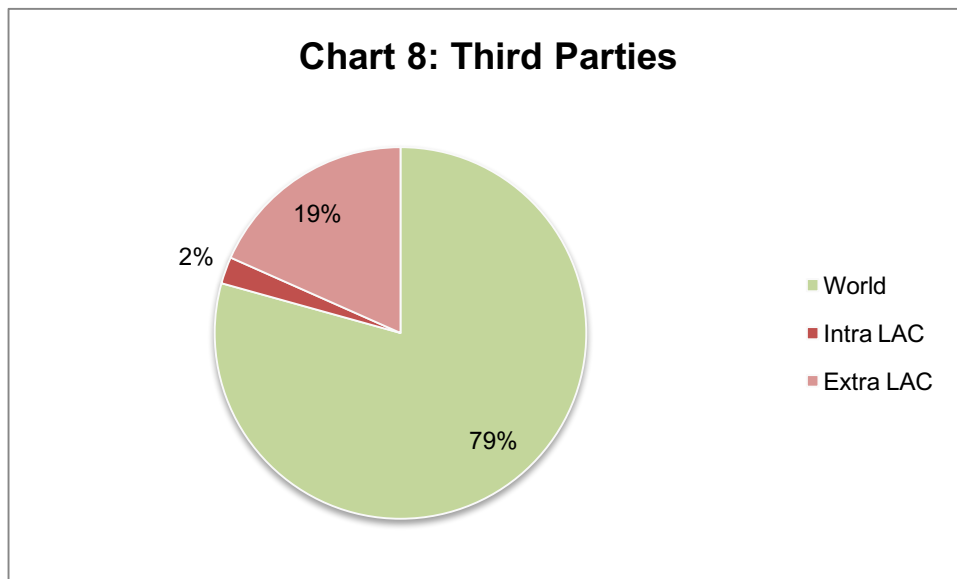
With respect to the Latin American countries, they have been active third-party participants within the framework of the DSM. Of the 2450 third-party participations around the world, 21% of these pertain to Latin American countries (639) but of the total participations, only 2% involve a complainant and a respondent from the region (72). (See Chart 8).

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<sup>9</sup> Article 10.2 of the DSU states that "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel...". On the other hand, article 17.4 establishes that "Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body."

<sup>10</sup> For some examples of cases, see the analytical index of the WTO, DSU, article X, "Table showing decisions on enhanced third party rights requests and factors considered", consulted on October 19, 2017, [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/dsu\\_04\\_e.htm#article10B4d](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_04_e.htm#article10B4d).

<sup>11</sup> Appellate Body Report, United States of America - Law of 1916, paragraph. 145 (WT / DS136 / AB / R; WT / DS162 / AB / R).



### Topics of Interest

The previous sections have reviewed LAC participations within the framework of the DSM, and this section will take a deeper look into the topics and agreements in which the region has greater interest.

In this sense, when the Latin American and Caribbean countries participate as complainants, the GATT of 1994 is by far the most frequently cited agreement in the dispute settlement cases filed by the WTO member countries in the region, and is mentioned in 108 participations (41% of mentions). It is followed by a distant second, corresponding to the Anti-Dumping Agreement, mentioned 32 times (12%); then the Agreement Establishing the World Trade Organization (9%), the Agreement on Agriculture (8%), the Agreement on Import Licensing Procedures (8%), the Agreement on Subsidies and Countervailing Measures (7%) and the Agreement on Safeguards (6%) (See Chart 9).

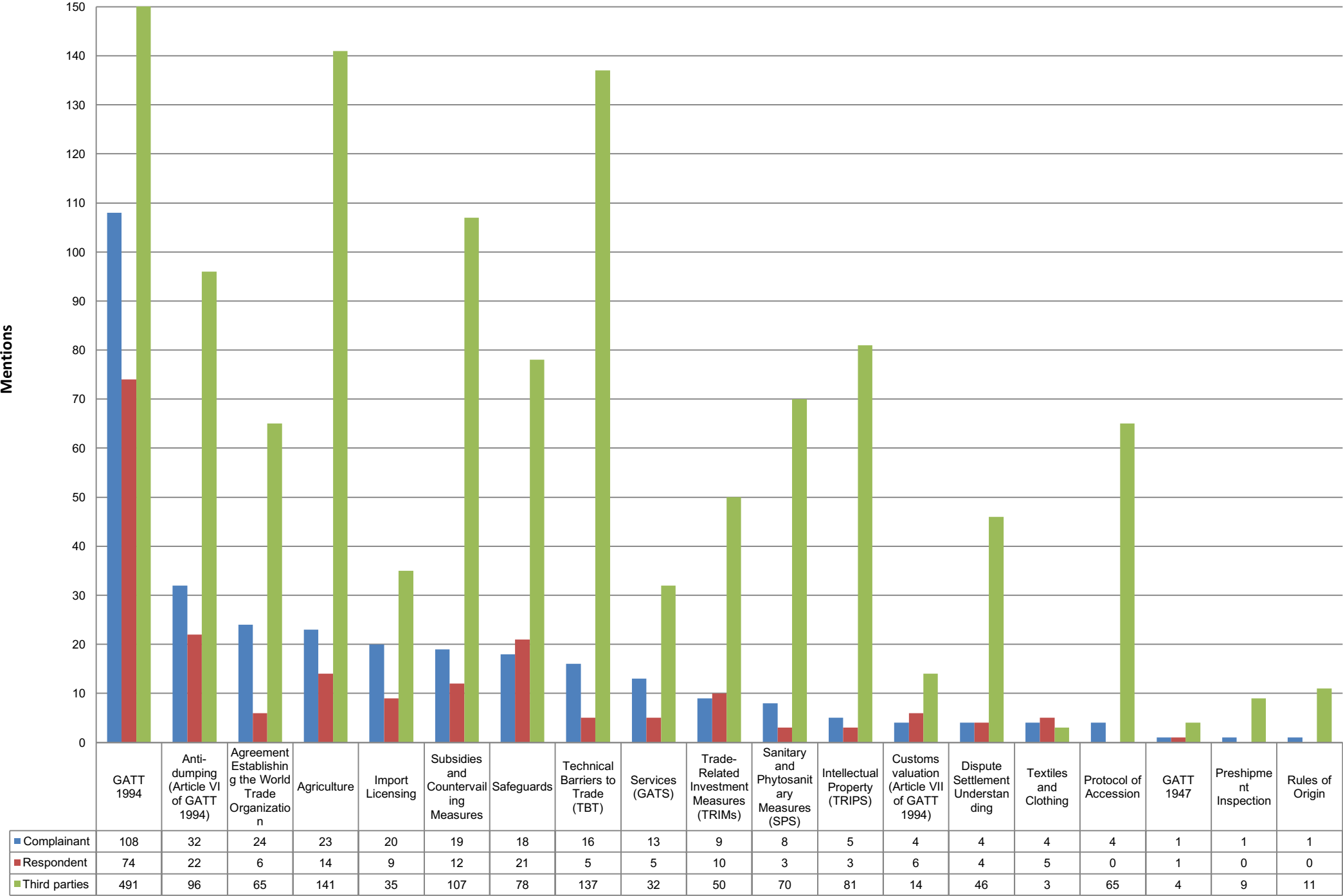
GATT 1994 mentions are also significant in cases where complaints are filed against LAC, with 75 total mentions, followed by the Anti-Dumping Agreement with 22 mentions (11%), Agreement on Safeguards with 21 (11%) and Agriculture with 14 (7%). Then comes Subsidies with 12 mentions representing 6% of the total, TRIMS with 10 mentions (5%) and Import Licensing with 9 mentions and 4% of the total.

On the contrary, there are few mentions of more recently regulated spaces such as the trade of services and intellectual property, in either of the two types of cases (LAC as complainant or as respondent). Under the same logic, there is no mention of government procurement, Civil Aircraft for cases filed by LAC and pre-shipment inspection and rule of origin for cases in which a complaint has been filed against the region.

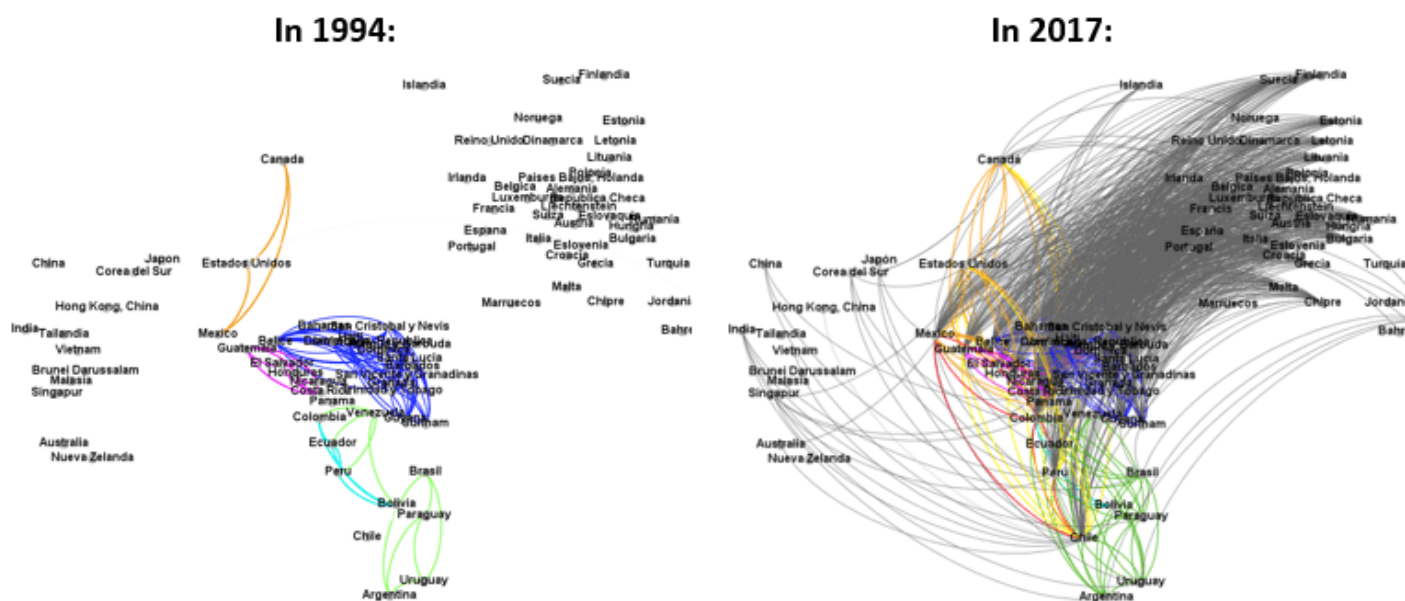
The high number of GATT mentions in dispute settlement cases filed by the countries of the region and, in general, by all WTO member countries, is not surprising. By default, it is treated as the “main agreement” on the trade of goods, which establishes the two main horizontal obligations applicable to the multilateral trade system: The Most Favored Nation (Art. I) and National Treatment (Art. 3). Likewise, it contains other provisions and specific obligations regarding Anti-Dumping Measures, Safeguards, and Customs Valuations, which were then developed in separate agreements. In fact, it is common for GATT to be mentioned in dispute settlement cases along with other agreements (Herreros y García-Millán 2015).

Regarding participation as third parties, it is interesting to note the high number of mentions in Agriculture (141 mentions), which shows the region’s interest in agriculture. In this sense, it is also important to mention that the region exported 97,447,155.37 billion USD in 2015.

Chart 9: Categories involved



The previous sections have covered the overall behavior of Latin American and Caribbean countries within the framework of the Dispute Settlement Mechanism of the WTO. These show the important participation of LAC countries and their main interests. Based on this, the following section will take a look at the reasons why LAC chooses to apply the WTO's DSM as opposed to the bilateral agreements entered.



Source: IDB

# NAFTA Model

Nullification or impairment: Immediate suspension of concessions

Mechanism Selection: The mechanism may be selected without being established in the agreement

Procedure stages: No diplomatic stage

Lists of panelists: A list is established in the agreement

Transparency: Amicus curiae

Preliminary Report: Established in the agreement

Financial compensation: Includes financial sanctions

# EU Model

Nullification or impairment: Suspension of concessions after investigation

Mechanism Selection: Mechanisms may not be selected if not previously established in the agreement.

Procedure stages: Includes a diplomatic stage

Lists of panelists: Ad hoc

Transparency: No se permite participation de partes no involucradas

Preliminary Report: None

Financial compensation: No financial sanctions

- **Nullification or impairment:** In the case of NAFTA, concessions may be suspended as a result of nullification or impairment upon initiation of the dispute settlement procedure. On the other hand, in the case of the EU, this must be preceded by an investigation.
- **Mechanism Selection:** In the case of the NAFTA mechanism, an alternative panel may be selected for dispute settlement such as, for example, the WTO's DSM. However, in the case of the EU model, a different mechanism may not be selected other than that established in the agreement.
- **Procedure Stages:** The EU mechanism includes no out-of-court stage for the dispute settlement, whereas the first stage of the NAFTA dispute settlement model is diplomatic by nature.
- **Lists of Panelists:** In the NAFTA model, the list of panelists must be designated a priori. That is, there is a preexisting list in the chapter on dispute settlement. In the case of the EU model, the lists of panelists are ad hoc. It is also important to note that in the EU-Mexico agreement, the list of panelists is not designated a priori. Therefore, the subtleties of each negotiation can be seen. Although the models have general characteristics, depending upon the negotiation process, these may present differences due to the negotiation itself and the parties' objectives.
- **Transparency:** In the NAFTA model, the idea of amicus curiae is established, which prevails at the moment the agreement is published. The NAFTA model not only allows for public dispute settlement but also recommends the participation of experts and civil interest groups. On the other hand, in the case of the EU model, the publication of progress and the participation of civil groups are avoided in order to facilitate a faster process.
- **Preliminary Report:** In the case of the NAFTA model, there is the obligation to submit a preliminary report before the final report. The objective of this is to quickly and easily make modifications. In the case of the EU, this preliminary report mechanism does not exist.
- **Financial Compensation:** In the case of the NAFTA dispute settlement mechanism, there is the possibility of financial sanctions in the form of fines for non-compliance with any provision of the treaty. In the EU model, this recourse does not exist.

These are some of the differences between the dispute settlement models found in the bilateral agreements signed by Chile. Nevertheless, other differences can be found, including private dispute settlement and the establishment of an arbitration panel.

## Why WTO?

After categorization of the dispute settlement mechanisms for the commercial agreements entered into by Latin American countries, it is interesting to note the preference for the WTO's DSM when commercial disputes arise. The question is, what are the motives behind this course of action?

This article seeks to generate a series of hypotheses to answer this question, and intends to review these hypotheses in greater depth in the future versions of this paper. In this sense, it is appropriate to start off with a

description of the origin of selection of this mechanism.

The countries' freedom to select a mechanism is derived initially from the pacific settlement obligation established in articles 2.3 and 33.1 of the Charter of the United Nations. This rule comes from the Briand-Kellogg Pact of 1928 and has been considered one of the fundamental principles of contemporary international law. Likewise, it has become an imperative rule and has been mentioned in a large number of the declarations of the United Nations and other international organizations.

Article 33.1 of the Charter reads as follows:

*"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"* (UN 1945).

This article not only shows the relevance of pacific dispute settlement, but also establishes the possibility of choosing the mechanism. According to the general rules of International Law, although disputes must be settled pacifically, there is nothing guaranteeing submission without good will and the necessary agreement of the countries involved in order to submit the dispute to a pacific settlement mechanism.

The freedom of mechanism selection becomes complex when analyzed within the framework of bilateral agreements. Although the commitment to pacific dispute settlement continues, the agreements, in general, and the free trade agreements, in particular, tend to establish a number of rules and procedures for the settlement of disputes derived from the agreement itself, which may or may not allow for the free selection of the mechanism, as explained in the previous section.

In general, the commercial agreements signed by Latin American and Caribbean countries, at the intra- and extra-regional levels, either allow for the free selection of the mechanism or establish the possibility of submitting the dispute to the WTO's DSM, under either the NAFTA or EU model.

Based on this and the question posed by Herreros and García-Millán (2015), there is a diversity of reasons for which a LAC country chooses to submit its commercial disputes to the DSM instead of the mechanisms provided by other bilateral agreements. Some of the hypotheses regarding this behavior are outlined below.

First, the dispute settlement mechanism of the WTO has the advantage of being expeditious. As discussed at the beginning of this article, the success of the WTO dispute settlement mechanism is due, in great part, to the timeframes defined each of the procedures. This helps countries minimize the amount of time required to reach effective solutions and, even more important, to reduce the financial costs involved in a dispute.

Secondly, although some bilateral agreements include a diplomatic or political stage for commercial dispute settlement, not all bilateral DSMs establish this out-of-court stage. The fact that countries have the opportunity to resolve their disputes politically minimizes the diplomatic costs that could arise from a commercial dispute. Likewise, the WTO's DSM, due to its history and structure, is understood by the Nations as a functional tool for dispute settlement and not a political provocation between the countries, such that the dispute is circumscribed to the scope of the WTO and, in general, does not escalate to diplomatic confrontations.

Then, the WTO's DSM allows for the presence of third parties. As mentioned in the previous sections of this article, the participation of third parties in the DSM allows for the multilateralization of the commercial dispute in order to achieve relative balance of power between the disputing parties. Although some plurilateral agreements also allow for the participation of third parties, the effectiveness of this type of participation in the WTO's DSM tends to be more important than in the PTAs.

Additionally, one of the most important benefits of bringing a dispute before the WTO is the retaliatory mechanism. Although there are some PTA mechanisms that consider some type of compensation for non-compliance with the commitments established in the agreement, the WTO's DSM has an enforcement mechanism that allows for the application of temporary retaliatory and cross-retaliatory measures to facilitate compliance with the DSM resolutions. Although this mechanism is used as a last resort, its existence is important as it persuades against non-compliance.

Finally, in general, bilateral agreements have an arbitration and ad hoc dispute settlement mechanism. Although there are bilateral agreement DSMs that have their own institutionalism, the expertise and experience of the WTO's DSM cuts through some of the red tape, make the process quicker and lowering the economic costs of the disputes.

Whenever the bilateral agreement so permits, the mechanism selection provides the nations in question the option to choose the rules that will govern the dispute settlement. The hypothesis presented in this article sustains that the countries' preference towards the WTO mechanism is based on its relative previous success due to the reasons listed above. In any case, this is a topic that merits further study in the future versions of this paper.

## Conclusions

The first part of this article analyzed the participation of Latin American and Caribbean countries within the framework of the WTO Dispute Settlement Mechanism.

In this sense, the total participations of LAC countries in the DSM are 865, representing 20% of participations at the global level. Brazil leads participations in the region, followed by Mexico and then Argentina. Then come Chile, Colombia, Guatemala, Ecuador, and Honduras.

Brazil, Mexico and Argentina are also the countries that file the most complaints, with nearly 57% of the cases filed by countries in the region. As respondents, LAC has also been brought before the WTO's DSM on 96 occasions, 46 of which have been intra-Latin American, while the remaining 47 have been extra-regional. Although both the number of cases filed by the region as well as those in which LAC countries have been respondents fail to correlate with their respective trade volumes.

Those who have files the most complaints against the region are the European Union, followed by the U.S., Japan and India. In terms of intraregional complaints, Argentina and Mexico take the lead, and of the 2450 overall participations as third parties, 21% of those belong to the Latin American countries (639), but of the total participations only 2% involve both a complainant and respondent from the region (72).

When Latin American and Caribbean countries participate as complainant, the GATT of 1994 is by far the most frequently cited agreement in dispute settlement cases filed by the region's countries within WTO, and is mentioned in 108 participations (41% of the mentions). It is followed by a distant second, corresponding to the Anti-Dumping Agreement, mentioned 32 times (12%); then the Agreement Establishing the World Trade Organization (9%), the Agreement on Agriculture (8%), the Agreement on Import Licensing Procedures (8%), the Agreement on Subsidies and Countervailing Measures (7%) and the Agreement on Safeguards (6%)

GATT 1994 mentions are also significant in cases where complaints are filed against LAC, with 75 total mentions, followed by the Anti-Dumping Agreement with 22 mentions (11%), Agreement on Safeguards with 21 (11%) and Agriculture with 14 (7%). Then comes Subsidies with 12 mentions representing 6% of the total, TRIMS with 10 mentions (5%) and Import Licensing with 9 mentions and 4% of the total.

The second part of this article was focused on generating a hypothesis regarding the reasons why the Latin American and Caribbean countries have preferred to resolve their respective commercial disputes using the WTO mechanism and not the other mechanisms specific to the commercial agreements they have entered.

Within this scenario, during the last few decades, the commercial agreements have proliferated at accelerated rates. While there were only 23 total commercial agreements existing in 1994, today there are more than 125 commercial agreements in effect that involve at least one Latin American or Caribbean country alone. These commercial agreements can be classified under two models according to the characteristics of their commercial dispute settlement systems: The NAFTA model and the EU model.

Whatever the agreement model, it is worth investigating the reasons why disputes involving LAC countries tend to prefer the WTO's DSM over the systems established in each of the bilateral agreements.

Finally, this question leads to a number of hypotheses, including the shortened timeframes, the establishment of a preliminary out-of-court stage, the presence of third parties, the existence of the retaliatory mechanism, among others. The future versions of this paper shall take a closer look at these hypotheses.



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## Appendixes

Country Name	Trade (%GDP)	Complainant	Respondent	Third party
Antigua and Barbuda	90.1	1	0	0
Argentina	26.1	20	22	60
Barbados	83.2	0	0	4
Belize	125.1	0	0	4
Bolivia	56.6	0	0	2
Brazil	24.6	31	16	113
Chile	56.1	10	13	47
Colombia	34.7	5	5	51
Costa Rica	63.5	5	1	14
Cuba	*31.6	1	0	18
Dominica	54.1	0	0	3
Dominican Republic	39.0	1	7	9
Ecuador	64.2	3	3	36
The Salvador	105.7	1	0	18
Grenada	66.0	0	0	1
Guatemala	47.0	9	2	38
Guyana	105.7	0	0	3
Honduras	43.5	8	0	26
Jamaica	78.4	0	0	8
Mexico	95.9	24	14	82
Nicaragua	94.3	1	2	17
Panama	81.5	7	1	9
Paraguay	44.8	0	0	21
Peru	104.7	3	5	19
Saint Lucia	76.8	0	0	3
Saint Vincent and the Grenadines	98.8	0	0	1
Trinidad and Tobago	41.5	0	2	4
Uruguay	41.5	1	1	13
Venezuela	***54.3	1	2	15

\*2015; \*\* 2014; \*\*\*2013

Source: Own elaboration based on [www.data.worldbank.org](http://www.data.worldbank.org)

